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A. M. Brenner

# COMMISSION LAW:

## PRINCIPLES AND POINTS

**A HANDBOOK OF THE LAW AS TO COMMISSIONS,**

**with Index, Appendix and List of Cases.**

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BY

*G. ST. LEGER DANIELS, LL.B. (Lond.),*

and of the Middle Temple, Barrister-at-Law.

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# PREFACE.

In the following pages nothing more is attempted than to give a brief account of the principal points which most commonly occur in commission claims, illustrated by adequate references to the authorities. The little manual, it is hoped, will be found capable of teaching by example some lessons of use to auctioneers and house agents, who, however, will do well to remember that the special facts of any given dispute should always receive serious consideration before recourse is had to the law. A list of cases reported in the ESTATES GAZETTE since 1861 will be found in the appendix.

G. ST. L. D.

Temple,
February, 1901.

# LIST OF CASES.

# PRINCIPLES AND POINTS

OF

# COMMISSION LAW.

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## INTRODUCTORY.

"How do you define 'commission agent'?" Lord Russell of Killowen, when at the bar, was once asked by a judge. "Well, my lord," was the reply, "I should call a 'commission agent' a person who acts as agent for a commission." As a matter of fact, there are various kinds of commission agents—stock, share, and other brokers, factors, clerical agents, theatrical agents, mortgage agents, and auctioneers and house agents, the class with which, of course, these pages are specially concerned. The law of commissions is a branch of the larger law of agency, but it will be our endeavour, under the different heads set forth below, to confine ourselves as much as possible to the principles and points in that law of chief interest to auctioneers, and to deal with them in a plain and business-

like, as contradistinguished from a technical and academic way. We shall make no endeavour unduly to multiply references and authorities. Practically all modern commission cases of importance are collected in Daniels's "Compendium of Commission Cases" (quoted below as "Comp. C.C."), and the reader will no doubt be aware that whenever a dispute of peculiar intricacy arises it is not only expedient but absolutely necessary to obtain proper professional assistance.

### THE CONTRACT.

Before an agent can maintain any claim against an alleged principal for commission, he must show that there was a valid contract of agency between them, that he was properly instructed and retained by the person whom he is suing. There must not only be a casual but also a contractual relation, and this important point was explained with remarkable clearness by Lord Watson in the classic case of "Millar *v.* Toulmin" (Comp. C.C., 62). There the question was whether, if the owner of the land employs an agent to let it, and he does let it, and the tenant afterwards, without any further communication with the agent, purchases the estate, the agent is entitled to commission on the sale. The House of Lords decided that he is not. "It

is impossible," said Lord Watson, "to affirm in general terms that A is entitled to a commission if he can prove that he introduced to B the person who afterwards purchased B's estate, and that his introduction became the cause of the sale. . . . If A had no employment to sell, express or implied, he could have no claim to be remunerated. If he was generally employed to sell and thereafter gave an introduction which resulted in a sale, he must be held to have earned his commission, although he did not make the contract of sale, or adjust its terms. . . . But assuming his employment to have been limited—if, for instance, he was employed to let and did let—he would, in my opinion, have no right to commission upon a subsequent sale." The agent, that is, must have his contract with, his retainer from the party whom he desires to render liable for the payment of commission. He must have been duly appointed, and the fundamental distinction between a casual and a contractual relation may be explained by saying that the person who may have been the real cause of the letting of a house, or of the sale of an estate, will not be entitled to claim commission unless he was acting under instructions and had been expressly or by implication employed for the purposes of the business in

question. If a man does me a service against my will or without my consent he cannot recover anything from me in respect of it. Suppose, for instance, that A, having heard that B wishes to sell his house, tells C, who agrees to buy, yet A cannot claim commission from B in respect of the sale, because he was never employed by B, and the contractual relation being wanting, he could found no claim on merely showing that he had first mentioned the house to C, who without such mention would not have agreed to buy. If the law were otherwise it would lead to a great deal of officious intermeddling by one man in the business of another.

It must be remembered, however, that, as was said in "Millar *v.* Toulmin," and repeated in several other cases, every dispute of this kind must turn on its own individual circumstances. The question "Retainer or no retainer?" is obviously one of fact, and the specific terms of any given retainer are also a matter of fact. It thus clearly becomes of great importance to consider the way in which a contract of agency ought to or may be constituted, what retainer an agent ought to require from his principal. Now, with few exceptions, no particular form is necessary for the appointment of an agent. An agent to make a contract under seal must be appointed

by an instrument under seal, and a corporation can usually only appoint an agent under its common seal. Sometimes, also, an agent may have to keep his eye on the Statute of Frauds, but, as a rule, he may be constituted either in writing or verbally or by implication from the conduct of the parties. Putting this last method aside as being comparatively rare, it will be well to say something on the subject of written and verbal contracts.

### WRITTEN AND VERBAL CONTRACTS.

A learned judge once said that he wished a law could be passed making commissions irrecoverable if the contracts concerning them were not in writing, and there can be little doubt that a large proportion of the litigation in respect of such claims arises from the fact of there having been no black and white agreement. The superiority of written over oral evidence of a contract cannot be too strongly or too often insisted upon. *Litera scripta manet.* Writing binds the parties to something definite, and as a general rule they cannot get away from it. It is a well-established and memorable rule of law that contracts in writing cannot be varied by extrinsic evidence of the intention of those who have entered into them. It takes a bold witness

to refuse to admit his own signature in the box, and when he has admitted it he is not allowed to say "Oh, yes, I signed the agreement no doubt, but what I meant was," etc., etc. The rule referred to applies equally whether the contract is reduced to writing under the requirements of a statute, or by the mere agreement of the parties, and whether it is contained in a series of letters or writings or in a single formal document. The writing becomes the only admitted evidence of the contract, because it would be contrary to the intention of the parties to admit any other evidence than the writing which they have agreed to and accepted as expressing the contract between them. This law is, to use a colloquial phrase, as old as the hills, and unlike some ancient rules of our jurisprudence, is founded upon the strictest common sense. To give an example of it which will be appreciated by our readers: If a sale by auction is followed by a written contract, the writing cannot be explained or added to or varied by verbal evidence of what passed at the sale: and if a contract is signed referring to the particulars and conditions of sale, evidence is not admissible to show that the auctioneer at the time of the sale made oral statements in explanation or in alteration of the particulars or conditions, as a statement that the

timber on the estate sold was to be taken at a separate valuation, or that such timber comprised a certain quantity ("Shelton *v.* Livius," 2 Cr. and J. 411; "Clowes *v.* Higginson," 1 V. and B. 524; "Powell *v.* Edmunds," 12 East, 6).

Few men, at any rate few business men, would, we expect, upon due consideration, deny that it is better in a court of law to rely upon a written agreement than the evidence of witnesses, however trustworthy, as to the purport and effect of a conversation or conversations. A great many people no doubt say to themselves that such and such a transaction is never likely to come into court. This is a curious form of carelessness, for though the great majority of transactions between man and man are not litigated, one can never tell when or how a legal dispute may arise or to what extent an individual or firm, who might *prima facie* be considered respectable and honest, will shuffle and equivocate to avoid payment of a claim. In commission cases in particular, it is very common to find a defendant denying a retainer, and, sad to say, getting his partner, or clerk, or wife, or son, to deny it as well. Judges and juries may certainly as a rule be trusted to see through tricks of this kind, but if there had been writing in the case there would and could have been no tricks or attempts

at tricks. And the point is that the heart of a defendant—and especially of a defendant to a claim for commission—very commonly becomes hardened by the process of litigation, and when, in spite of all his machinations, judgment goes against him, he makes up his mind that execution at least shall be fruitless, an unrighteous purpose which there is more than one way of accomplishing. The thought that writing is superfluous and uncalled for may therefore prove a dangerous one to entertain, and with regard to another ordinary argument—that to ask for a formal agreement, or letter, or commission note, might offend the person to whom the request was addressed, all we can say is that honest and straightforward men of business are not and ought not to be annoyed at such a precautionary measure. They would in all probability act in the same way themselves in the same circumstances. In any event, for the reasons above hinted at, we do not think that an agent would be well advised to allow such a consideration to stand in the way of his asking for an agreement, unless the case was one in which doubt would practically be ridiculous.

In "Debenham *v.* Slazenger" it was held that Messrs. Debenham, Tewson and Co., the plaintiffs, must have the retainer or instructions upon

which they acted stamped before they could be put in evidence. The case was heard in the Lord Mayor's Court before the Assistant Judge (Comp. C.C., 353).

### THE PERFORMANCE OF THE CONTRACT.

It is not, of course, every defendant in a commission case who would be likely to deny the retainer. A man sued for money lent does not as a rule repudiate the loan, but, supposing the lender to be dead and his executors to be suing, it is easy to see in what a difficult position they might be placed if no I.O.U. or other written evidence of the loan existed. In a claim for commission an analogous state of affairs might, and not uncommonly does, arise: in fact, legal disputes generally come upon us in an unexpected way. One does not deliberately walk into a law court; one is drawn into it. Hence the advantage of writing, and hence also the superiority of a formally drawn up and definite contract over a series of letters more or less loosely written, and over a memorandum or entry of the retainer, which might have to be supported or amplified by verbal testimony.

This brings us to the performance of the contract, a subject with regard to which the first question must necessarily be, What was the con-

tract? As a general rule what is written speaks for itself, though there are some cases in which difficulties of construction may arise, and others in which — and this is an important exception to the rule as to the sacredness of the written word mentioned above — evidence of custom or usage is admissible for the purpose of annexing incidents to the terms of a written contract concerning which the contract itself is entirely silent. If the definite contract of the agent is properly and completely performed, he can, of course, claim payment of his entire commission, whether a lump sum or a percentage on the result had been agreed for. Other circumstances may arise in which he may be entitled to some payment from his principal though not to commission, and which may enable him to issue a writ indorsed with a claim for damages, or "on a *quantum meruit*," as the phrase runs. With reference to the first-named claim — that for the entire commission on an alleged complete performance of the agreement — it cannot be too strongly pointed out that the question of such performance must in every case be decided by reference to the terms of the particular contract in controversy. What was the contract? Stipulations as to the events on which, and the times at which, commission is payable vary *ad infi-*

*nitum*. An agent suing for commission must be very careful in considering the whole of the circumstances of his case, or in submitting them for legal opinion. The rule is *Ex facto oritur jus*—tell me your facts and I will tell you the law applicable to them. Though, however, general propositions are always subject to exceptions, they demand attention as forming the groundwork of all systems of law.

A leading rule as to the performance of the contract is that the event must have occurred on the happening of which commission was payable. This sounds simple enough, but in practice it gives rise to a vast number of disputes between agents and their principals. For if, which is generally the case, it has been agreed that commission shall only be payable on performance of the contract, the natural tendency of the agent is to allege such performance, to reduce, as it were, his duty under the contract to the lowest possible terms, whilst, on the other hand, if the principal has not received any actual benefit from the agent's exertions, he is prone to insist firmly and resolutely that such benefit is and should be considered a condition precedent to his liability to pay commission. We think that in disputes of this kind the undoubted tendency of modern decisions has been favour-

able to the agents, the courts being generally inclined to hold that where an agent has brought together his principal and a third person ready and willing to conclude the proposed contract, he is entitled to commission. "Fisher *v.* Drewett" (Comp. C.C., 384) is a very well-known case on this subject. The plaintiff there was a mortgage broker authorised to procure a loan for the defendant by a letter, which said, "In the event of your procuring me the sum of £2,000, or such other sum as I shall accept, I agree to pay you a commission of $2\frac{1}{2}$ per cent. on any money received." A building society, through the plaintiff's intervention, agreed to advance a sum of £1,625 upon the defendant's property, but as the latter declined to furnish the requisite abstracts of title, the negotiations fell through. When the plaintiff claimed commission the defendant contended that the receipt of the money by him was a condition precedent to the right to commission. On the trial the plaintiff obtained a judgment, which he retained in the Court of Appeal. Lord Justice Bramwell remarked, "It is possible that the parties to this agreement may have had several intentions. One is that the defendant should pay commission to the plaintiff on such moneys only as he actually received, having the right, if he chose

to exercise it capriciously, to refuse to receive; another is that the plaintiff should not be paid his commission if the defendant refused to receive for a good cause; a third, that the plaintiff was to lose his commission if the defendant did not receive the money through the default of the vendors; a fourth, that the word 'receive' is equivalent to the word 'accept,' which also appears in this document. . . . My impression is that the tendency of decisions has been to hold that persons who for commission effect bargains were entitled to receive it when they had done all that they bargained to do, without reference to the agreement between the other parties. That seems to me the tendency of modern decisions, and I think it is reasonable, because such a person has done all that he contracted to do, and ought not to be dependent on what the other parties do. . . . In my opinion, 'on any money received' means 'on any sum of money in respect of which you shall have procured me a good contract to receive.'"

The fact that the agreement in "Fisher *v.* Drewett" was in writing did not prevent litigation. Its terms were ambiguous, but it is pretty safe to say that if there had been no writing at all the mortgage broker would never have recovered his commission. Another very

familiar case, which is commonly quoted in conjunction with "Fisher *v.* Drewett," is "Green *v.* Lucas" (33 L.T., 584). The defendant had agreed to pay the plaintiffs, who were auctioneers, surveyors and valuers, a commission of 2 per cent. for procuring him on loan the sum of £20,000, upon the security of certain leasehold property at Southwark. Shortly before the contract of agency was entered into the defendant had furnished the plaintiffs with two valuations of the property, which stated that the lease was for a term of 99 years, the value being given at "about £37,000." One of the valuations assumed that the lease "contained no arbitrary or restrictive clauses, but only the usual covenants." The plaintiffs, acting upon these valuations, applied for a loan to a provident institution, the directors of which agreed to make the advance "subject to the title and all other questions proving to be satisfactory." It was, however, subsequently discovered that instead of being for 99 years absolutely, the lease contained a proviso for re-entry under certain conditions which amounted to a substantial deterioration of the value of the property, and the institution accordingly refused to make the advance. On the plaintiffs bringing an action for their commission, they obtained a verdict, which

the defendant, who contended that the plaintiff had not procured the advance within the meaning of the contract, was unable to upset upon appeal. "It appears to me," said Lord Chancellor Cairns, "that the plaintiffs have done everything which agents in this kind of work are bound to do, and it would be forcing their liability if they were to be held answerable for what happened after. If the contract afterwards were to go off from the caprice of the lender, or from the infirmity of the title, it would be immaterial to the plaintiffs, and that appears to be the understanding of the parties themselves. . . . . Either it was a sufficient reason to justify the company in refusing to go on with their loan, or it was not. If they were not justified, the defendant ought to have proceeded against them: and if they were justified, then the failure of the loan was owing to the defendant's own default, or the failure of the security he had proposed." "I am of opinion," said Baron Bramwell, "that the word 'procure' in this contract means to procure the lender and not the money, and that the contract was completed, as far as the plaintiffs were concerned, when they had procured a person who was ready and willing to advance the money."

To give a case on the other side, one in which,

though "Fisher *v.* Drewett" and "Green *v.* Lucas" were invoked by the parties claiming commission, their claim was successfully resisted, in the modern case of "*Re* the Sovereign Life Insurance Company, Salter's Claim" (Comp. C.C., 159), the authority or retainer was contained in a letter in which it was stated that "if directly or indirectly through your (the agents') introduction this loan is procured, we (the company) agree to pay you a commission of three-quarters per cent. on that amount." The question was, Did the agents, directly or indirectly, procure the introduction of a loan, or, in other words, were they the means of introducing to the company any person who was willing to make the advance required? Mr. Justice Chitty answered these questions in the negative. "The procuring a person," said his Lordship, "willing to negotiate about the matter is not sufficient. The readiness and willingness required must be a continued readiness and willingness to go on with the loan according to the usual course of business in such a transaction. Where the broker obtains a contract for his principal, the matter stands on a different footing. If the claimants in the present case had obtained a contract from the intending mortgagees to advance the money, and the matter had afterwards

not been completed by reason of defects in the title of the company to the property, it may well be that the commission would have been earned." The learned judge, having held on the facts that the claimants had not procured a person ready and willing to make the loan on the terms proposed, also decided that no claim could be maintained on a *quantum meruit*, inasmuch as the contract was entire and the whole of the services agreed to be rendered had not been rendered. He was also of opinion that there were no facts to justify a claim to damages on the ground that the company had by their own act or default prevented the agents from performing the services in question and so earning their commission

The effect of these three cases taken together is to illustrate what we have said is the tendency of the judges of to-day, and to show, at the same time, that the decision of disputes as to whether or not commission has been earned must invariably and inevitably turn upon the facts of the given case. "Was there an express contract that nothing should be paid unless the money was actually received? Or was the contract that the plaintiff should be paid his commission whether the money was actually received or not, provided it was procured? It depends on the

contract" (*per* Chief Justice Erle in "Green *v.* Reed," 3 F. and F., 226). It is for the agent, before suing for commission, to ask himself the question whether he has substantially rendered the services contemplated by the contract reasonably construed. In determining (or endeavouring to determine this he never ought to allow himself, as so commonly happens, to be prejudiced in favour of his own "merits." He should remember that though he may have "done something," and even expended a considerable amount of trouble and time (which means money) over a transaction, he may not be in a position to claim the commission agreed on, although an action for damages or on a *quantum meruit* may be maintainable by him. After all, it is not difficult in the majority of cases for a principal and agent to mould the agreement between them as they wish, and in important cases to take the advice of brother men of business, or even of lawyers, to assist them in doing this. The agreement between the principal and agent may provide that commission shall only be payable if the contract between the principal and the third party—the buyer, or lessee, or lender—be actually carried out, payment, that is, being contingent on the happening of some event in addition to the agent's performance of his part of

the contract. Even after having taken all reasonable precautions of this kind an agent is not absolutely insured against dispute and litigation, but he has done all that reasonably can be done, and must leave the rest to the course of events.

### CUSTOM AND USAGE.

We may quit this branch of the subject by calling attention to a few cases of special interest to house agents, showing how the original agreement of the parties may be modified by considerations of custom and usage and by other circumstances.

"Kirk *v.* Evans" (Comp. C.C., 97) raised the question whether a commission on the sale of building land was payable on the signing of the agreement of sale, or on the completion of the buildings and the creation of ground rents. The plaintiff, a surveyor and estate agent, was employed by the defendant to sell a piece of land for building purposes. He found a purchaser, who commenced building, but did not complete. There was a conflict of evidence as to the custom which prevailed, and several architects, surveyors, and engineers were called on either side. Mr. Baron Pollock, having stated the general rule that commission was earned when the contract was obtained, came to the conclusion that

the evidence supported the custom set up by the defendant, namely, that commission was payable, not when the agreement had been signed by the parties, but when leases were granted and ground rents accrued.

In connection with the question of custom "Curtis *v.* Nixon" (24 L.T., 706) may be cited as showing that a custom must be reasonable before a right of action can be founded upon it. The plaintiff was a house agent, and had found a tenant for the defendant's furnished house. The defendant informed the plaintiff that he had agreed with the tenant "from July 1, 1869, to April 1, 1870, 300 guineas: or 350 guineas if taken on to May 1, 1870"; the tenant "to have the option of taking the house on from April 1 for another year for 470 guineas." An agreement was afterwards drawn up by the plaintiff, but it contained no mention of an option to take on for another year at all. Before the end of the tenancy the defendant and the tenant, through the intervention of another house agent, and without any communication with the plaintiff, agreed for another year's occupation from April 1, for 450 guineas. The plaintiff was paid his commission on the rent for the first nine months, and brought an action to recover commission upon the rent of the following year also.

The Court held that he was not entitled to recover. The plaintiff had given evidence of an alleged custom of the trade to the effect that a house agent should receive commission upon the rent of a furnished house from year to year, so long as the tenant to whom he let occupied the house. Mr. Justice Willes, however, thought that such a custom, if proved, was irrational and bad under the circumstances of the case before him, though he considered that it might have been reasonable if applied to an original letting for the whole of the two terms, *i.e.*, if the rent was obtained as a proximate consequence of the labours of the house agent. "These actions by house agents," observed his Lordship somewhat severely, "spring up at every turn, and as they are generally based upon agreements which they have persuaded people who are not so well versed in the law as themselves to enter into to their injury, they ought not to be encouraged."

Where the question is one of the construction or interpretation of a document, whether will, deed, or letter, it is, as a rule, of no great use to refer to precedents. The precise words used must be considered by the light of logic and common sense. We need not accordingly multiply cases dealing with the construction of contracts, and consequently with what has to be

done in order to the due performance of such contracts; but it may be as well to allude to two or three other well-known authorities on the point with which we are concerned.

"Harris *v.* Petherick" (39 L.T., 543) was an action by an auctioneer to recover commission and other charges for negotiating a partnership between the defendants and a man named Mowat. The defendants had by letter agreed with the plaintiff to remunerate him "in the event of their taking Mowat into partnership," and they afterwards entered into a written agreement with Mowat by which it was agreed that they should enter into partnership as and from a specified future day, when a formal deed of partnership should be executed. Mowat, as a matter of fact, never did become a partner, and at the trial evidence was given to the effect that the defendants had refused to take him into partnership. It was held in the Common Pleas Division that, although the agreement between Mowat and the defendants did not constitute a present partnership, there was evidence of a taking into partnership within the meaning of the letter of agreement between the plaintiff and the defendants, and "Green *v.* Lucas" and "Fisher *v.* Drewett" were cited in support of the contention that inasmuch as the plaintiff had done all that

he contracted to do, the defendants were not to be allowed to act in an arbitrary manner, and so evade their obligation. The case is a notable one, as showing that, though the contract between the principal and the third person is never acted upon, commission may be due to the agent. On the other hand, auctioneers and agents must not read it as an authority for holding that mere negotiation between a principal and a third party will give them a right to commission for having effected a contract.

We have already adverted to "Millar *v.* Toulmin" in connection with the distinction between a casual and a contractual relation, between the introduction and the ultimate transaction; but the case may usefully be referred to again in connection with the question of an agent's right to commission where he has been employed to find a purchaser or tenant at a particular price, and the principal eventually sells or lets at a lower price to a person introduced by the agent—a question obviously pertinent to our present subject. Dealing with it, Lord Watson, in "Millar *v.* Toulmin," said, "When a proprietor, with a view of selling his estate, goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general

employment; and should the estate be eventually sold to a purchaser introduced by the agent, the latter will be entitled to his commission, although the price paid should be less than the sum named at the time the employment was given. The mention of a specific sum prevents the agent from selling for a lower price without the consent of his employer; but it is given merely as the basis of future negotiations, leaving the actual price to be settled in the course of the negotiations." In the case put by Lord Watson there would, no doubt, be an important variation from the terms of the original arrangement. But the rule is *Volenti non fit injuria*. If the principal himself consents to a reduction in the price, why should not the agent recover commission in respect of his introduction of the purchaser? To hold otherwise would practically amount to saying that a man never ought to be allowed to change his mind on a point which concerns him alone. Bentham, we know, "laughed out of court" the old-fashioned notion that our jurisprudence was the perfection of reason. Still, common law is very often common sense.

### THE INTRODUCTION.

Passing from the contract of agency, from the retainer or instructions given by the principal

to the party he employs, and questions of construction that may arise under them, we may proceed to consider the vitally important point, What is an introduction? When an agent has contracted or proffered to introduce a third party to his principal, when may he be said to have performed his contract or proffer? Those who follow the commission cases given in such a paper as the ESTATES GAZETTE—and it may here be said that an intelligent perusal of reports should constitute a very fair legal education for the amateur—will be fully aware that disputes on such questions as, Who was the first introducer? Did he introduce a party "ready and willing"? Was his introduction gratuitous? are constantly arising. It is, indeed, hardly too much to say that there is a certain type of principal who is always raising such points with his agent. The latter seemingly has no sooner got him what he required—a loan of money, a tenant for his house, or a purchaser of his ground rents—than he begins to ask himself why, after all, he should pay commission. The sum due to the agent will very likely take all the gilt off the gingerbread. He would be robbing himself and his family to hand it over, but as the agent or auctioneer is a friend, and has undoubtedly done something—though very little—he will offer him

£5 to cry quits, which he may either take or leave, and bring his action; it will be a case of oath against oath. There is only one course for an agent to pursue when dealing with a person of this kind. He must give him a short day for payment, and in default commence legal proceedings, and push them through with the utmost rigour and promptitude. He need have little fear of getting a judgment, for the atmosphere of a court of law is in the great majority of cases fatal to defences founded on chicanery and evasion. Whether he will ever obtain the fruits of his judgment is another matter. The defendant may turn out to be substantially a man of straw—if such an Irish phrase is permissible—or, as we have previously had occasion to say, he may make up his mind deliberately to defraud his judgment creditor. Such unfortunate contingencies are, however, incident to all departments of business, and should not be allowed to sway a claimant of commission from what is clearly the right and practical course to pursue.

When, then, is an introduction valid, so that an action for commission can be maintained in respect of it? The general rule is that where a claim to commission is based upon the ground that the agent introduced to his principal the

purchaser, tenant, or other contracting party, he must show that such introduction was the foundation upon which the transaction proceeded, and without which it would not have proceeded; in other words, he must show that the contracting party entered into the contract, or was ready and willing to enter into the contract, through his, the agent's, introduction. The agent must have been *causa causans*, the effective cause, of the sale, mortgage, etc., being carried through ("Maple *v.* Schofield," ESTATES GAZETTE, Dec. 22, 1900). As Chief Justice Tindal said in the old case of "Wilkinson *v.* Martin" (8 C. and P., 1), a "dry introduction" of one man to another is not enough; an operative introduction is required. We propose to give a few of the more important out of the many cases illustrating this, premising, however, that great care is sometimes needed before the delicate distinctions sometimes drawn by the judges can be appreciated.

Many of our readers will no doubt be aware that "Green *v.* Bartlett" (Comp. C.C., 377), which was decided as far back as 1863, is the leading case usually quoted in support of the thoroughly well-established rule that if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to com-

mission, although the actual sale was not effected by him. The action, which deserves detailed notice, was brought by an auctioneer against the defendant under the following circumstances. He had been employed to sell under a written agreement by which he was to receive a commission of $2\frac{1}{2}$ per cent. "if the estate should be sold," but "in case the estate should not be sold" he was only to have £25 for his trouble. Having put the property up to auction unsuccessfully, the agent was asked by a person who had attended the sale who the owner was, and referred him to his principal, and ultimately that person, without any further intervention of the agent, became the purchaser. The jury found for the plaintiff. On appeal it was argued for the defendants that the plaintiff's right to commission could only arise upon a sale of the property being actually negotiated by him. It was contended that he was only entitled to the £25, but the Court declined to take that view, and upheld the verdict for the larger amount. "The agreement between these parties," said Chief Justice Earle, "was that if the property should be sold the defendants should pay the plaintiff $2\frac{1}{2}$ per cent. commission on the amount of such sale: but that if it should not be sold the plaintiff's remuneration for trouble and out-

lay should be limited to £25. Now the estate was sold, but not by the plaintiff. After the plaintiff had done all he could to effect a sale, the defendant, telling the plaintiff that he did not mean to sell the estate, himself privately negotiated a sale with a gentleman who had been attracted to the auction room by the plaintiff's advertisements, and who had learned from the plaintiff that the defendant was the proprietor of the estate. The question whether or not an agent is entitled to commission on a sale of property has repeatedly been litigated; and it has usually been decided that if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission, although the actual sale has not been brought about by him. I think, the sale here having been brought about through the plaintiff's introduction, the plaintiff is entitled to the stipulated remuneration of $2\frac{1}{2}$ per cent. on the amount of the purchase money."

The *ratio decidendi* of "Green *v.* Bartlett" is that where an agent has done all he has contracted to do, and all he can reasonably be expected to do, it would be a constructive fraud upon him to allow his claim for the agreed remuneration to be defeated by the avarice, malice, or caprice of his principal. A whole string of

cases analogous to "Green *v.* Bartlett" might be quoted, were it necessary, but, as we have said, we shall confine ourselves to the more important illustrations of the principle which it affirms.

### INDIRECT INTRODUCTIONS.

An introduction may have the desired effect indirectly as well as directly. The agent may establish a "chain" between his principal and the ultimate purchaser, and if the links of the chain are complete he will be just as much entitled to his commission as if he had himself directly and without other assistance carried out the transaction. If the agent is *causa causans* that is sufficient. This may be said to be a corollary of "Green *v.* Bartlett." "Bayley *v.* Chadwick" (Comp. C.C., 2) was concerned with the indirect results of an agent's exertions. The action was for commission on the sale of a ship, the contract being in the following terms: "In case the ship is not sold by auction she is forthwith to return to the custody of the owners for private sale; but in case a subsequent sale be effected to any person or firm introduced by you, or led to make such offer in consequence of your mention or publication for auction purposes, you to be entitled to the same 1 per cent. commission on such sale." The agent advertised the ship

for sale by auction, but no sale was effected. It was subsequently bought from the defendant, the owner, by a person who was not present at the sale, and who had not seen the advertisement, but who made an offer to the owner through having heard of the advertisement. The jury found for the plaintiff, and the Divisional Court refused to grant a new trial. The Court of Appeal, however, reversed their decision, Lord Justice Bramwell calling the contract above quoted a "foolish document," and remarking that in his opinion there was no evidence that the ultimate sale of the ship was effected to a person who was led to make an offer in consequence of the plaintiff's mention or publication of the ship for auction purposes. The case went to the House of Lords, who restored the decision of the Divisional Court, holding that there was ample evidence to go to the jury in support of the plaintiff's claim. Some words used by Lord Coleridge in the Divisional Court are noticeable. His Lordship observed, "Looked at fairly, 'in consequence of' must include indirect as well as direct consequence. That may make the contract an indirect one, but that does not affect the question. By the very collocation of words in the contract it seems to be reasonably clear that the parties did intend very in-

direct consequences indeed." "Bayley *v.* Chadwick" is a sufficiently striking example of how widely distinguished judges may sometimes disagree—a truth which litigants and would-be litigants would do well always to bear in mind.

The question of the completeness of the "chain" between a seller and a buyer, or a lessor and a lessee, is constantly cropping up. Before venturing to sue, a prudent agent should always satisfy himself that the links of the chain are complete, or, to alter the metaphor, that the peg upon which he is endeavouring to hang a claim for commission is strong enough in point of law to bear such claim. It is not every indirect introduction that will serve for such a peg, and in view of the importance of the matter we will add to the cases above mentioned one or two in which the services of the plaintiff were adjudged to be not of a nature to entitle him to commission, his introduction having been too indirect—too remote—for the law to take cognisance of.

In "Barnett *v.* Isaacson" (Comp. C.C., 43), which created a great deal of interest about twelve years ago, the plaintiff was suing for £5,000, commission on the sale of the business of the defendant, who traded as "Madame Elise." In May, 1880, the defendant had written to the

plaintiff: "In the event of your introducing to me a purchaser of the business, I undertake to pay you a commission of £5,000." In the following December the plaintiff introduced a Mr. Chatteris, a member of a firm of accountants, not specifically as a purchaser, but as a gentleman who might find a purchaser, and the defendant gave him also a commission note for £5,000 if he found a purchaser. Subsequently (in 1884) Chatteris purchased himself, and deducted the commission of £5,000 from the purchase money. Barnett then sued for his commission, on the ground that he had introduced a purchaser, and the jury, though they would not give the whole £5,000, found in his favour for £2,000 on a *quantum meruit*. But even this he was held not entitled to in the Court of Appeal. "The person introduced," said the Master of the Rolls, "must become purchaser through the plaintiff's introduction." Lord Justice Lopes added that introducing a purchaser meant introducing a person "in the capacity of a purchaser." With regard to the alternative claim for work and labour, it was said, "To entitle a plaintiff to sue upon a *quantum meruit* the rule was that if the plaintiff relied upon the acceptance by the defendant of something he had done, he must have done it under circumstances which

led the defendant to know that if he, the defendant, accepted what had been done it was on the terms that he must pay for it. The acceptance of the introduction here did not take place under such circumstances that the defendant must pay for it." The facts of "Barnett *v.* Isaacson" were such as are not likely to occur again in a hurry, but it is permissible, we think, to look upon the case as one of "hard lines" for the plaintiff. He had done something, and something which bore substantial fruit, but "remoteness" was the rock upon which he split.

Another case in which the plaintiffs failed to recover was that of "Lumley *v.* Nicholson" (Comp. C.C., 27). There the plaintiffs had been employed by the defendant to sell an estate of about 650 acres, for which the defendant wanted £37,200, upon the terms that they should be paid a commission upon the amount of such sale. The plaintiffs offered the estate to A, who purchased some of the lots, and the plaintiffs duly received their commission upon those lots. On the completion of the purchase the defendant withdrew from the plaintiffs the authority to sell, whereupon they gave him notice that they should claim commission upon any further lots which might be purchased by A. Subsequently A purchased the remaining lots by private con-

tract, but at the trial he swore that he had no intention of buying the remaining lots until long after the revocation of the plaintiffs' authority. Lord Coleridge asked the jury to say whether or not the sale of the latter portion of the estate was brought about through the introduction of the plaintiffs. They found that it was not, and the Divisional Court declined to disturb the verdict. "It is clear," said Mr. Justice Hawkins, "that although the name was introduced by the agents, they were not the cause of the purchase, and cannot therefore claim commission." The chain, that is, had been broken, and the second transaction was a new and independent transaction. "*Causa proxima* is not the question; the plaintiffs must show that some act of theirs was *causa causans*" (per Brett, J., "Tribe *v.* Taylor," 1 C.P.D. 505).

### CLAIMS ON A "QUANTUM MERUIT."

Auctioneers or agents suing for remuneration may put their case in three different ways; they may claim commission; they may ask to be paid for work and labour done upon a *quantum meruit*; or they may sue for damages for not having been allowed to earn their commission. It is very common to endorse on the writ and set up in the statement of claim under these

various forms what is intrinsically the same demand. The question under what circumstances an agent may sue upon a *quantum meruit* is an interesting and important one, for it often happens that if a plaintiff cannot "kill" with his first barrel—a claim for commission—he can with his second—a claim on a *quantum meruit*, *i.e.*, for the value of services which may have been rendered by the agent to the principal, though they were not originally estimated or taken into consideration by the express agreement made between the parties. There are, of course, many instances in which a claim on a *quantum meruit* cannot be sustained. Most contracts to pay commission are entire; either the whole commission is due, or nothing at all. Take for example "no cure, no pay" cases, such as "If you complete the sale of Blackacre for me within a month for £10,000 I will give you £100." In "Green *v.* Mules" (30 L.J. C.P., 343), Chief Justice Erle remarked that in certain cases "services which have been performed are of no value, and this is one of those cases. . . In a great number of instances house agents go to a great deal of trouble, on the terms that if they get no purchaser they shall have no claim. They claim largely, and often justly, on the ground that they are obliged to put down names

and get nothing." "This," said Mr. Justice Wills, "is not like the case of 'Prickett *v.* Badger' (Comp. C.C., 381), where the plaintiff had done everything, but the employer took the matter out of his hands, for here the employment was to be at an end if Newman did not advance the money; if he did the plaintiffs were to have £100. It seems to me that on the contingencies which happened nothing was to be paid."

In giving some examples of cases in which claims on a *quantum meruit* have been made, we must premise that such disputes, like those in which alleged indirect introductions are concerned, are very often "on the border line," the special facts and circumstances requiring to be most carefully taken into account by the plaintiff agent and his legal advisers.

It may in the first place be stated that if there was originally no agreement as to the amount of the remuneration to be paid to the agent, the law will imply a promise on the part of the principal to pay a remuneration which shall be fair and reasonable according to ordinary or customary rules. "Clark *v.* Smythies" (Comp. C.C., 379) was an action by auctioneers and estate agents for work done and commission earned. The defendant had told the plaintiffs that he had tried to dispose of an estate by private contract,

and wished to know their terms for selling it by auction. The plaintiffs in reply sent their scale of charges by commission on the total amount realised by sale, and stated that they charged the commission if the estate were sold within six months after the time of auction, and if not sold within that time the charge would be a fee of 30 guineas, exclusive of expenses. Subsequently the plaintiffs introduced a purchaser for part of the estate for £3,000, but the sale was rescinded by the defendant, who re-sold to another person. After some abortive sales had been held by the plaintiffs, the defendant sold the remainder of the estate for £13,800. The plaintiffs thereupon claimed commission on the £3,000, and also on the £13,800, in addition to 30 guineas and the expenses of advertising and abortive sales. Lord Chief Justice Cockburn directed the jury that in the absence of any express contract auctioneers were entitled to reasonable remuneration for sales by private contract effected through their instrumentality, even although by the act or default of the vendor the contract was rescinded; and that it was for the jury to say whether the same commission as on sales by auction was reasonable. The jury awarded the plaintiffs £51 beyond the amount (£400) which had been paid into Court.

In connection with claims under an express contract and on a *quantum meruit*, some interesting remarks were made in "Williamson *v.* Hine" ([1891] 1 Ch., 390). "A paid agent," it was there said, "is bound to discharge all those duties, multifarious or otherwise, and arduous or otherwise, which the terms of that agency cover. He must make his own bargain with his principal, and it is his duty to do all that that bargain entails, and to be content with his remuneration. If he is called upon to do anything outside the terms of his agency, he is entitled to make a special bargain, or he can decline to do it unless he is remunerated on a special footing; or he may do the work, and provided everything is fair and above board, he probably would be allowed some fair remuneration according to some recognised measurement of value." But, it is added, if he does anything within the terms of his agency, however uncompensated it may seem to him personally, he cannot charge for it in his account.

Probably the most likely and frequent case where a claim on a *quantum meruit* can be sustained is where, by what amounts to the mutual consent of principal and agent, the agent desists from prosecuting his attempts, when some, but not all, of the services contemplated in the

original employment have been rendered. In "De Bernardy *v.* Harding" (8 Ex., 822) the defendant, being about to erect seats for viewing a public funeral, entered into an agreement with the plaintiff, a foreign agent, to make the scheme known abroad, and dispose of tickets for the seats. The plaintiff was to be paid for his working expenses by a commission or percentage on the tickets which he sold. After he had incurred certain expenses, but before he had sold any tickets, the defendant desired him not to dispose of them, as he would sell them himself. The plaintiff accordingly sent all applicants for tickets to him, and after the funeral delivered to the defendant a bill for work done and expenses incurred. The defendant paid the expenses, but refused to pay for the work, and the Court held that it was a question for the jury whether the original contract was not rescinded by mutual consent, and whether there was not a new implied contract that the plaintiff should be paid for the work actually done upon a *quantum meruit*.

A case very well known to auctioneers and house agents is that of "Prickett *v.* Badger," in which the *quantum meruit* question arose in this way. The defendant had employed the plaintiff to sell certain land at a given price.

The plaintiff found a purchaser at the price named, but the defendant was discovered to be not in a position to sell, and he consequently revoked his authority. At the trial it was contended for the defendant that the only contract between the parties was a special contract for commission on accomplishing a sale, and that the action should have been for wrongfully withdrawing the authority to sell. The Lord Chief Baron overruled the objection, and told the jury that though the plaintiff was not entitled to the commission, he was entitled to reasonable remuneration for his services. The jury awarded £50, the claim being for £140 odd. The defendant applied for a new trial on the ground of misdirection, but the Court of Common Pleas held that there was no reason for this. However—to complete this account of a "classic" action—they directed a new trial on the ground that there was evidence that the defendant had employed the plaintiff to sell the land upon the terms that if he found a purchaser at the price named he was to receive his commission, that the plaintiff did find a purchaser, but that the transaction fell through because the defendant failed to come duly forward as a vendor. Mr. Justice Willes remarked, "It was the defendant's disinclination or disability to proceed that pre-

vented the sale being completed. The plaintiff would have been entitled to receive the commission agreed on if the defendant's conduct had not prevented his earning it."

With reference to the *quantum meruit* question as it arose in "Prickett *v.* Badger," the same learned Judge observed, "I am anxious it should not be supposed that the Court intends to lay it down as a general rule that where an agent is employed to sell property, and his authority is revoked before anything has been done under it, he is at liberty to resort to the common law counts for his work and labour in endeavouring to find a purchaser. In such a case, nothing more appearing, if the plaintiff attempted to rely on the *quantum meruit* he would probably be met by the implied understanding that the agent is only to receive a commission if he succeeds in effecting a sale, but if not, then he is to get nothing."

Upon a careful examination of the authorities it will be found that the application of the law with regard to claims on a *quantum meruit* depends, as Mr. Justice Willes intimated, very much on the special circumstances of the case under discussion. The general rules with regard to the subject are well and clearly put in the "Encyclopædia of the Laws of England" (Vol.

X., pp. 599-601), from which the following propositions are condensed:—

1. Where work has been done by the plaintiff for the defendant under a contract, express or implied, that it shall be paid for, or upon the defendant's request, from which such a contract would be implied by law, but the price of the work has not been agreed upon, the plaintiff can recover its reasonable value (*quantum meruit*) from the defendant.

2. But if the work has been done under a special contract which remains open, no action will lie for a *quantum meruit*. This means that if the completion of the special contract is a condition precedent to the payment for the work, then, subject to the exceptions stated below, nothing need be paid till the completion is effected. (Work done, it is added, by a commission agent in negotiating a bargain is by custom only to be paid for if a bargain is effected ["Read *v.* Rann," 10 B. and C., 438; "Simpson *v.* Lamb," 17 C.B., 603], unless this consummation is prevented by the defendant's own conduct. It may be noted that in "Chinnock *v.* Sainsbury," 30 L.J. Ch., 409, the Master of the Rolls stated that where a person agrees with auctioneers for the sale by them of property in a particular manner, and he then changes his

mind, the rule is that, subject to the payment of the claim of the auctioneers for their expenses, the Court will not enforce the agreement in an action for specific performance. In such a case, the agent's remedy, if any, is to sue for damages).

3. When, however, something has been done under a special contract, which remains open, but not done in accordance with the contract, and the other party has accepted the benefit of the work, its value may be recovered.

4. Where, again, the other party has refused to perform or has incapacitated himself from performing his part of the contract, he may be sued on a *quantum meruit* for the work which the plaintiff has done immediately. . . . . Here the question always is whether the acts and conduct of the party in default evince an intention no longer to be bound by the contract.

5. If the part of the contract which is left unperformed by the plaintiff cannot legally be performed, he may sue on a *quantum meruit*.

### THE AMOUNT OF THE REMUNERATION.

The amount of the commission or remuneration payable to the agent is determined either by agreement or by custom.

On the question of remuneration, as on every

other question, the advantages of an express written agreement are obvious. The intention of the parties appears in black and white, no point as to a possibly obscure trade custom or usage can arise, and the risk of dispute and litigation is reduced to a minimum. But this, of course, is not to say that an original written agreement invariably precludes subsequent disagreement. If the contract was that upon the sale of Blackacre A was to have £100, there cannot well be a difference of opinion, but the principal and the agent may agree that the amount of the commission payable shall be determined in any way they please, as long as no rule of law is violated. For instance, they may arrange that the amount of commission shall be the difference between a price named and the amount received by an agent for sale, and "Morgan *v.* Elford" (4 Ch. Div., 352) is a case of this sort, which was very stoutly and at great length fought out between the parties, and is of considerable interest and importance to commission agents. The plaintiff, between whom and the defendant nothing in the nature of a fiduciary relationship existed, wrote to the defendant, Elford, authorising him to sell a colliery, and informing him that whatever he got over £25,000 he might have for himself by way of commission.

The defendant Elford thereupon wrote to his co-defendant, Crispe, giving him the refusal of the property at £30,000. The latter subsequently completed the purchase, and £30,000 was paid over, of which a sum of £5,000 was handed to Elford. The plaintiff, however, discovered that the real purchase money had been £40,000, of which £10,000 had been paid to Crispe, who would appear to have got up a kind of syndicate. The plaintiff filed a bill praying that the defendants might be ordered jointly and severally to pay over to the plaintiff the £10,000. Vice-Chancellor Malins made the order on the ground that when an agent for the sale of an estate colludes with a purchaser, and in consideration of a bribe or honorarium allows the purchaser to obtain the estate at less than its value, with a view to a sale at a higher price to a sub-purchaser, and the transaction is concealed from the vendor, both agent and purchaser will be held jointly and severally liable to pay to the vendor the increased amount obtained by the sub-sale. The Court of Appeal and the House of Lords, however, reversed this decision, upon the ground that the bargain between the owner and the agents was that the latter should have whatever the property fetched over £25,000, and dismissed the bill. It is, indeed, manifest

that Morgan got what he wanted, namely, £25,000, and the question might well be asked, What did it matter to him how much over that sum was obtained and how the surplus was divided? An agreement is an agreement. But "Morgan *v.* Elford" shows how difficult it sometimes is to construe an agreement, especially when it has to be pieced out from a long series of letters. Nothing could have been stronger than the language used by the Vice-Chancellor with regard to the conduct of Elford and Crispe. But the higher tribunals entirely and emphatically disagreed with that language—a striking illustration, if one were needed, of the risks and perils of litigation.

We have already said that the best plan is for the parties to have a definite written agreement as to commission, and in this connection it may be added that when this has been done the agreement cannot be varied by evidence of custom. In the old case of "Bower *v.* Jones" (8 Bing., 65) an agent was, by agreement, to have a commission on all sales effected or orders executed by him for his principal. The latter was to be responsible for bad debts, and the agent was to draw his commission monthly. The question for the Court was whether the agent was entitled to credit for commission on sales

which subsequently turned out to be unproductive, owing to the insolvency of the purchasers. It was argued that he was not so entitled, inasmuch as the custom of the trade was that commission was not payable on sales which produced only bad debts. The Court, however, decided that the terms of the agreement between the parties prevailed over the custom. *Expressum facit cessare tacitum.*

Some of our readers may have heard of commission cases in which the defence has been raised that the plaintiff was only promised a "present"—the defendant would "give him something" if the business went through. It is not as a rule easy to induce a judge and jury to believe that the arrangement between principal and agent was of this kind. "Nothing for nothing" is the common maxim in the world of business, and in a case of the sort contemplated, although there may be "oath against oath," there is certainly not "probability against probability." Still, it is certain that the promise of a present is an engagement of honour which affords no ground of action. Where an agent performs any service on the terms that his employer will take his services into consideration, and "make such remuneration as may be deemed right," Lord Ellenborough ruled that it was

optional for the employer to pay remuneration or not, according as he should think fit, and nonsuited the plaintiff in an action brought to recover compensation for the services in question. The obligation was merely an honorary one ("Taylor *v.* Brewer," 1 M. and S., 290).

Turning to the question of commission or remuneration as determined by custom, in the absence of express agreement trade usage affords the means of ascertaining what is due, as well to a commission agent as to a person engaged in any other business. A butcher, a builder, a surgeon, a solicitor—all these may make a special bargain as to payment, or leave to custom the remuneration to be received by them for goods supplied or work and labour done. Amongst auctioneers and house agents certain scales and rates of commission are authoritatively fixed, and into this familiar topic it is not necessary to enter in these pages. As to the law, two short cases may be quoted. In "Roberts *v.* Jackson" (2 Stark., 225) the plaintiffs, shipbrokers, procured a charter party for the defendants' ship to Rio Janeiro. They claimed 5 per cent. upon the whole voyage out and home. The defendants contended that they were entitled only to $2\frac{1}{2}$ per cent. on the home voyage. Evidence of custom was given that a broker in

the position of the plaintiffs was considered to be entitled, whether the ship was lost or not. Lord Ellenborough, whilst regretting the absence of a special contract, pointed out that the allowance and custom of the trade is the only way, in the absence of a special contract, of ascertaining what is due. The jury found for the plaintiffs. In "Rainy *v.* Vernon" (9 C. and P., 559) the plaintiff was employed to sell ground rents by auction on the terms of receiving a commission of 1 per cent. "on sale." After he had advertised, but before the day of sale, the defendant sold the ground rents by private contract. The custom of the trade was proved to be that after an auctioneer was employed, and the property advertised by him, he was entitled to the full commission on a sale being effected, although not through his direct agency. Lord Denman directed the jury that if there was an express contract it could not be varied; but, as there was no such contract, they should consider whether the usage proved was so notorious that the defendant must have known it, in which case it became part of the contract. The jury found for the plaintiff for the full commission. It may fairly be said that the expressions "reasonable remuneration" and "remuneration according to custom" are convertible terms.

## REFUSAL OR INABILITY OF PRINCIPAL TO COMPLETE.

It is only reasonable that when an agent has done all he undertook to do—as, for instance, where he undertook to procure a contract and has found a person ready and willing to contract—he should be entitled to his commission. He will, moreover, be entitled to it though his principal is unable or unwilling to complete: though the negotiations are ended by the voluntary act of the principal: and though the principal wrongfully prevents the performance of the contract. This doctrine really proceeds upon the old maxim *Nemo debet locupletari ex alterius incommodo*, *i.e.*, no man should be allowed to profit by another's loss. Where an agent has done work he must not be deprived of his remuneration by the default or wrongful act of his principal, but we may repeat that many disputes of this kind are "border line cases," and the whole of the facts and circumstances upon which a claim is based require to be carefully considered. With regard to inability or unwillingness on the part of a principal to complete, we have already alluded to "Prickett *v.* Badger," "Green *v.* Lucas," "Fisher *v.* Drewett," and other cases, and for the purpose

of illustrating the law applicable to negotiations ended by the voluntary act of the principal it will be useful to compare the two old cases of "Horford *v.* Wilson" (1 Taunt., 12) and "Bull *v.* Price" (17 Bing., 242).

In the former the defendant had promised to pay the plaintiff £5 if he procured a tenant for certain premises, and got him £350 for the lease. The plaintiff procured one Stevens, with whom the defendant entered into an agreement, Stevens agreeing to take the premises for £350, and paying the defendant £50 by way of deposit. Stevens being unable to complete, the defendant consented to liberate him from the performance of the agreement, and retained the £50 by way of forfeit. Such a compromise was clearly the defendant's voluntary act and deed. He thought it for his own interest to settle or he would not have done so, but that was no reason why the agent should be damnified by the settlement. Accordingly the plaintiff obtained a verdict and a rule for a new trial was discharged. "The plaintiff," said Mr. Justice Rooke, "procured a tenant whom the defendant accepted, with whom he entered into an agreement for these premises, and under that agreement received £50 as a deposit. It is true that he did not afterwards insist on the full performance of this engage-

ment, but he retained the money which had been paid, and thereby affirmed the contract." The defendant, if he had thought proper, might have rejected Stevens, but as he did not do so the plaintiff was to be considered as having fulfilled his part of the contract. A principal, in fine, must not blow hot and cold and sacrifice, or endeavour to sacrifice, his agent to his own interests.

The circumstances in "Bull *v.* Price" were different. There the plaintiff, a surveyor, had been retained by the defendant to negotiate with the Commissioners of Woods and Forests for the "sale" to them of certain premises of the defendant, for which he was to receive a commission of 2 per cent. on the sum which might be "obtained" by private treaty or otherwise. The value of the property was ultimately assessed by a jury at £4,000, but in consequence of a defect in the defendant's title, of which the plaintiff was not aware, the money was not paid to her, but lodged in the hands of the Accountant-General to abide the adjustment of the difference. The defence to the claim for commission was that it was premature, inasmuch as the defendant had not "obtained" the money awarded. The plaintiff, however, contended that he was entitled as soon as the defendant's right was ascertained;

but Chief Justice Tindal directed a non-suit on the ground that the word "sale" must be construed strictly. A consummated sale was meant, and the plaintiff was bound to wait until the money was actually "obtained" by the defendant, though, if it could be shown that the non-receipt of the money by her arose out of any default of her own, she would not be permitted to set up as a defence that she had not obtained it. On moving to set aside the non-suit, "Horford *v.* Wilson" was cited as an authority for the proposition that there had been a substantial performance of the condition on the plaintiff's part; but the Court pointed out that in that case it appeared that the negotiation had been ended by the voluntary act of the defendant, and the non-suit was upheld. The question was, in common parlance, Was it the defendant's fault that she had not received the money? Clearly it was not; but the special circumstances of the case prevent it from being a violation of the general rule that wherever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay is liable to the party who is to receive the money if he does any act which prevents or makes it less probable that he should receive it. Other cases which may be consulted on this head are

"Planché *v.* Colburn" (8 Bing., 14), and "Roberts *v.* Barnard" (1 C. and E., 336), where it was held that when nothing remains to be done by the agent to entitle him to his commission if the transaction had been carried through, he may recover damages equal to the full amount of the commission which he would have earned.

### EMPLOYMENT OF SEVERAL AGENTS.

It is a matter of common knowledge that when a house or property is of anything like substantial value it is often placed on the books of more than one agent. In such a case the agent entitled to commission is he who has been *causa causans*—the effective introducer of a purchaser or lessee—the party who has really brought about the transaction in respect of which the claim is made. The rule is the same where negotiations with one set of agents have been dropped, that is, completely broken off, and the business put into the hands of others, the second retainer thus practically constituting an entirely new departure. Here again is a class of disputes in which a lawyer is bound to enquire of an agent or auctioneer "What are the details, what is the precise point of your claim? If you do not state the case with particularity I cannot advise safely and properly upon it." It con-

stantly happens that a client will endeavour to put his claim, as he thinks, in a nutshell. The lawyer cracks the nutshell and finds there is "nothing in it." If what the client says is true there can be no defence. The statement may be true, but it may not be the whole truth. The client, for example, may have given an introduction, but not an effective introduction, and the result will be that he will be flung in his action, and find a Job's comforter in his counsel, who takes occasion to remark, "Well, if I had been told this I should never have advised you to sue." A fatal reticence on the part of a client often springs from a want of knowledge of what he is talking about: he really does not appreciate the crux of his own case. But there is another variety of litigants who are possessed with the idea that it is well and advisable not to tell their lawyers everything. They "know they are right," and do not want to be told they are wrong. They wish to sue, and they will sue. Of this desperate and hopeless class one can only say *Qui vult decipi, decipiatur.*

A well-known modern case on the subject of the employment of several agents and the right to commission as between them is that of "Barnett *v.* Brown" (Comp. C.C., 131). It was a contest between house agents to determine which

of them was entitled to commission for introducing a purchaser of a house in the West-end. An action to recover the commission had been originally brought by Barnett against the vendor, who paid the commission into Court, and the question now was which of the rival agents was entitled to take it out of Court. (It may be pointed out that where a principal admits his liability to pay commission to somebody, but neither knows nor cares to whom he ought to pay it, his best and most convenient plan is to pay the money into Court and let the agents, if their claim is based on the same foundation, "interplead." See "Greatorex *v.* Shackles" (Comp. C.C., 231); "Newson *v.* Tillett and Yeoman" (*Ib.* 372). The facts were that the plaintiff Barnett had introduced the house in question to the purchaser and given her an order to view. The defendants, subsequently, had also given her an order to view. The purchaser broke off the negotiations with the plaintiff, but continued those with the defendants, and ultimately purchased through them. The plaintiff and the defendants both claimed commission. For the plaintiff it was urged that there could be only one introduction, and that, as he was the first introducer, he was entitled to the money in Court. Lord Justice

Lopes, however, observed that "there might be fifty introductions," and that the question was whose introduction brought about the purchase, a question which was answered by his Lordship in favour of the defendants, for whom judgment was accordingly entered. Barnett had introduced, but his introduction was a "dry" one, and had no result.

On the other hand, in "Burton *v.* Hughes" (1 T.L.R., 207), the plaintiff estate agent was successful in his action for commission on the sale of the defendant's house. The defendant had informed the plaintiff that he wished to sell if he could find a house in the country, and asked the plaintiff's terms in the event of his finding a purchaser of the lease. The plaintiff stated his terms, and subsequently gave a card to view to a Mr. Howe, who, however, on learning that the price asked for the lease was £16,000, gave up all idea of purchasing. The defendant, having bought a house in the country, placed the property above-mentioned in the hands of other house agents. They advertised it, and so brought it to the notice of a friend of Mr. Howe's, upon which Mr. Howe entered into negotiations with the fresh agents and eventually bought for £11,000. The usual commission was paid by the defendant to the second firm of agents,

but that bare fact would not of course exonerate him from also paying the first introducer. Mr. Howe stated in his evidence that he should have purchased the lease if his attention had never been called to it by the plaintiff, and that the intervention of the latter had not influenced him in purchasing it. Mr. Justice Mathew, nevertheless, held that the plaintiff was entitled to commission at 1½ per cent. on the purchase money, on the ground that the plaintiff in finding the purchaser had done all that he had undertaken to do, the agreement of the defendant being that he would pay commission if the property were sold through his introduction.

### BREAKING OFF NEGOTIATIONS.

This case, when carefully considered, is not inconsistent with "Barnett *v.* Brown," inasmuch as it turned upon the finding of fact that the house was sold through the plaintiff's intervention. Under the peculiar circumstances, Burton was, whilst Barnett was not, *causa causans*. For the rest, it is not strange that judges and juries should often find it very difficult to solve the problems of, what is a complete breaking off of negotiations?—what is a really "fresh transaction"? Such questions are often extremely delicate ones, and it is sometimes quite impos-

sible to say in which way they would be decided in a court of law. Speaking generally, a substantial lapse of time is shown to have occurred by the defendant between his abandoning negotiations with the first firm and betaking himself to fresh agents. If, for instance, in one shooting season agent A offered B a moor in Scotland for £2,000 and B would not take it, but the next season took it from agent C for £1,000, agent A could hardly claim commission from the owner of the moor on the ground that he had been the effective introducer of B. But the question of time is not invariably the only one involved in cases of the kind, and it would really seem as if the only practical, if not entirely satisfactory, advice to give an agent is that he should look upon all the circumstances by the light of his own experience and the ordinary knowledge of a man of business and man of the world. In "White *v.* Lucas" (Comp. C.C., 15) the claim was for commission on the sale of a house at Lancaster-gate for £22,000. The defendant denied the agency, alleging that the sale had been effected through a friend of the purchaser and himself. It appeared that the purchaser had gone over the house in 1883 with one of the plaintiffs' cards, but that the negotiations were then dropped until they were renewed in 1885

through the friend in question. The defendant also stated that the only authority possessed by the plaintiffs was to sell for 25,000 guineas. Mr. Justice Grove left two questions to the jury (*a*) Had the employment, the retainer, been proved by the plaintiffs? (*b*) If so, was it by anything they had done, *i.e.*, through their instrumentality, that the house had been sold? He pointed out to them that the defendant had given evidence to the effect that he had been willing to avail himself of the plaintiffs' services as volunteers and pay them if any business was done; and that he did not employ the plaintiffs as his agents at all, but refused to allow them to place the house on their books and registers, though, if they had brought him an intending purchaser who would have offered £25,000 he might have entertained the proposal without binding himself to accept it. The jury found for the defendant.

One more instance worth quoting of this class of dispute is supplied by the old case of "Murray *v.* Currie" (7 C. and P., 584). A, the plaintiff, and B and other land agents had been severally employed to sell an estate for the defendant. A gentleman named Prothero called upon A to enquire after another estate, and was told by him that it was not in the market, but that the

defendant C's estate was to be sold. He then took from the plaintiff a particular of the estate, and afterwards meeting B, the other agent, negotiated with him the terms of the purchase, which was afterwards completed. The plaintiff thereupon brought an action for commission on the sale, viz., 2 per cent. on the purchase money payable by usage to the agent who found the purchaser. On the trial land agents were called to prove a custom that where several agents were employed, the person who found a purchaser should have a commission of 2 per cent. whether he did anything more towards the completion of the purchase or not; but they stated that they knew of no instance where one agent had found the purchaser and another had completed the purchase, but only instances where the completion had been by the vendor himself. Lord Denman directed the jury that the real question was whether in point of fact the plaintiff found the purchaser, *i.e.*, the person who ultimately became the purchaser, and that, if they found this in favour of the plaintiff, they should say what compensation he was entitled to, as they were not bound to give the amount of commission, though the amount usually paid was some evidence to regulate their decision. The jury gave the plaintiff a verdict, but for a

smaller sum than the amount of the commission he had claimed. (Four very recent cases on the subject of "breaking off negotiations" and "fresh transactions" are "Aldridge *v.* Kynaston," "Williams *v.* Tuckett," "Gudgeon *v.* Cowper-Smith," and "Martin *v.* Barnard," which are reported Comp. C.C., 358, 361, 363 and 365.)

AGENT'S NEGLIGENCE.

Actions for negligence against professional men, whether solicitors, surgeons, surveyors, or estate agents, are extremely rare, a state of things which reflects great credit on those bodies, and which is no doubt to some extent due to the fact that their businesses, being carried on in accordance with a settled course and practice, afford under ordinary circumstances small scope for mistakes either of omission or commission. Of course, however, it is inevitable that errors should be sometimes made, and the general rule is that where the services of the agent are entirely useless through his negligence or want of skill, he will not be entitled to remuneration or commission. The maxim is *Spondes peritiam artis.* A man who calls himself and practises as a doctor, dentist, etc., is presumed to have adequate knowledge of his vocation and to use reasonable skill and diligence in it. A corollary

of the general rule is that if the principal receives some benefit and advantage from the services of the agent, though not all that might have been expected, the agent, in the absence of anything appearing to the contrary, will be entitled to proportionate compensation.

Two cases particularly affecting auctioneers may be quoted on this subject. "Denew *v.* Daverell" (3 Camp., 451) is an authority for the proposition that, if an auctioneer employed to sell an estate is guilty of negligence whereby the sale becomes nugatory, he is not entitled to recover any compensation for his services. In giving judgment in that case, Lord Chief Justice Ellenborough observed, "I pay an auctioneer as I do any other professional man, for the exercise of skill on my behalf which I do not possess myself; and I have a right to the exercise of such skill as is ordinarily possessed by men of that profession or business. If from his ignorance or carelessness he leads me into mischief, he cannot ask for recompense, although from a misplaced confidence I follow his advice without remonstrance or suspicion." Again, "Jones *v.* Nancy" (13 Price, 76) was an instance of such negligence on the part of an auctioneer in conducting a sale of real estate as disentitled him to be reimbursed the expenses to which he had

been put. Briefly speaking, he had so conducted the sale that no valid legal contract had been effected, and the bidder could not be considered an actual purchaser who would be bound to complete. "This is not," said Mr. Baron Graham, "a case of hardship upon the auctioneer; nor is it necessary that he should be a loser by the conduct of the bidder, because an auctioneer, who should do his duty, would in all such cases have a right to recover the auction duty (the case was tried in 1824) which he may have paid under his liability as auctioneer, from his employer; and if he had no right to recover in this instance, it must be a consequence of his own mistake, if not misconduct. If he had done enough in this case in his capacity of auctioneer, and there was no blame imputable to him, he certainly might have recovered the money from his employer, and if he had not, he is only precluded by reason of his own mistake or misconduct."

The rule that a professional man ought and is bound to know his own business was exemplified in the case of a surveyor in "Moneypenny *v.* Hartland" (1 C. and P., 352). It was there held that if a surveyor, employed to make an estimate, is so negligent as not to inform himself (by boring or otherwise) of the nature of

the soil of the foundation, and it turns out to be bad, he is not entitled to recover anything for his labours. "If a man," said Chief Justice Abbott, "employs a person to make an estimate who tells his employer that the work will cost £10,000, and it costs £15,000, and it appears that the surveyor did not use due diligence, can it be contended that the employer is bound to pay for such information?" "Moneypenny *v.* Hartland" was decided something like eighty years ago, and the law it sets forth is "as old as the hills." In modern times our readers may remember, amongst other cases of the kind, an action brought by an architect against the well-known financier and sportsman, Colonel North, in respect of the building and decoration of the colonel's mansion at Eltham. The plaintiff was suing to recover £2,718, the balance of his account for commission, and the substantial defence was that the plaintiff had grossly underestimated the expense by putting it successively at £30,000, £40,000, and £65,000, and had accordingly been guilty of negligence disentitling him to recover. The plaintiff denied the negligence, and in fact there had been no contract with the builders and decorators limiting the amount to be expended. The ultimate cost was said to have been about £115,000, and

Colonel North had himself signed orders which made up £80,000. The jury decided the broad question whether the defendant had been led into excessive expenditure by the improper conduct of the plaintiff in the negative, and the architect obtained a verdict for the full amount of his claim

The question of negligence is always one for the jury. What were the circumstances? is the point to be considered. As an ordinary rule, for instance, a house agent does not guarantee the solvency of a tenant introduced by him, but cases might arise in which his want of reasonable care and diligence in enquiring as to such solvency would not only disentitle him to commission, but render him liable in an action for damages at the suit of the landlord. Such a case was "Heys *v.* Tindall" (30 L.J.Q.B., 262). The defendant, an auctioneer and house agent, was employed for commission to find a tenant for the plaintiff's house. He introduced a tenant, who paid the first quarter's rent, but then became insolvent. The plaintiff landlord therefore brought an action against the defendant house agent for damages, and the latter denied his liability and claimed commission as a set-off. Two questions were left to the jury by Mr. Justice Blackburn. First, was it upon the evi-

dence part of the defendant's employment for which he was to earn a commission that he should make reasonable enquiries as to the eligibility of the tenant? Secondly, if so, had he made such enquiries? The jury found in favour of the plaintiff landlord for £28 odd damages. On a motion for a new trial it was contended that a house agent does not guarantee the solvency or eligibility of a tenant. Lord Chief Justice Cockburn, however, answered this by saying that "the house agent must use reasonable care and diligence in ascertaining the condition of a person before he introduces him to the landlord as a tenant. It cannot be supposed (his Lordship added) that the commission of 5 per cent. is to be paid for only putting the name of the owner and the particulars of the premises upon the house agent's books for the information of those who may come to make enquiries." "When the owner of a house," said Mr. Justice Crompton, "proposes to a house agent that he should find a tenant for him, it is meant that he should find a fit and proper tenant." Mr. Justice Wightman, again, asked what the house agent was supposed to receive his commission for? The answer given was "For introducing a tenant," but the reply made by the Court was that if a broker introduces a

notoriously bad customer to his employer an action will lie for negligence, and that where a solicitor is employed to procure a mortgage security, he impliedly undertakes to ascertain that the title is good and the security is sufficient. The application for a new trial was accordingly refused. The expression used above, however—"notoriously bad" customer—may be noted, and also the fact that the decision in "Heys *v.* Tindall" does not appear to be regarded with entire satisfaction by the editor of "Woodfall's Landlord and Tenant" (*q.v.*, p. 70, 16th edn.).

### AGENT'S MISCONDUCT.

The relation between principal and agent is a fiduciary one. "The principal," says Mr. Justice Story, "contracts for the aid and benefit of the skill and judgment of the agent; and the habitual confidence reposed in the latter makes all his acts and statements possess a commanding influence over the former" ("Equity Jurisprudence," 2nd English edition, § 315). The courts, it is pointed out by that learned jurist in another passage, do not affect to enforce, as *custodes morum*, the strict rules of morality. "But they do sit to enforce what has not inaptly been called a technical morality. If confidence is reposed it must be faithfully acted upon and

preserved from any intermixture of imposition. If influence is acquired it must be kept free from the taint of selfish interest and cunning and overreaching bargains. If the means of personal control are given they must be always restrained to purposes of good faith and personal good" (§ 308). The writer is here contemplating the relation of principal and agent in connection with the subject of constructive fraud. An agent, in fine, may not only be guilty of absolute and direct negligence, but of conduct which constructively and indirectly damages his principal, and this is illustrated by the rule that an agent employed to sell land or other property on commission cannot purchase the property on his own account as long as the relationship of principal and agent for sale exists between him and his employer. He must not place himself in a position which is incompatible with if not antagonistic to the strict performance of his duty as agent, and may lead him to operate what is at any rate a constructive fraud upon his employer. If he acts in such a way he will lose all right to commission, and "Salomons *v.* Pender" (3 H. and C., 539) is commonly quoted on this head. There the plaintiff, an architect, surveyor, and land agent, sued the defendant for the sum of £456 10s., commission on the sale of

certain lands. The defendant had employed the plaintiff to sell a plot of land at Manchester at 10s. per yard. Nothing was said as to commission. The plaintiff brought the property to the notice of the promoters of a theatre, who made an offer through the plaintiff, which was accepted. The plaintiff sold to the promoters, and on the following day the promoters, together with the plaintiff and four other persons, were registered as a public entertainments company. The defendant had accepted the promoters mentioned as purchasers, but was ignorant that at the time of his acceptance the plaintiff had been appointed architect of the proposed company, that he had taken shares in the scheme to the extent of his commission as such architect, and was *pro tanto* a promoter, and that in the interval between the verbal and written contract of sale the plaintiff had taken a larger interest and agreed to become a director. The plaintiff's charge was the usual one, and he did not get any commission from the company. Mr. Baron Martin directed a verdict for the defendant on the ground that the plaintiff having himself become a purchaser of the land which he was employed to sell, could not recover agent's commission on the usual scale. This view was upheld by the full court. "I think," said Mr.

Baron Bramwell, "that when a man employs an agent to find a purchaser for him he means that the agent shall find some third person and not the agent himself." "I have heard nothing to satisfy my mind," said Chief Baron Pollock, "that a person can in the same transaction buy as a principal and charge commission as an agent. Now here the plaintiff has not acted as an agent at all, and so he is not entitled to any commission. He cannot charge commission as agent on a sale in which he himself is, either alone or jointly with others, the buyer of the property sold." Mr. Baron Bramwell stated that he gave his opinion "apart from any suggestion of fraud," that is, direct fraud. The law with regard to not allowing a man to place himself in the anomalous position of being an agent as well as a principal, a buyer as well as a seller, is, as we have said, founded on the general doctrines obtaining as to constructive fraud.

Agents to purchase are in this connection subject to rules similar to those which bind agents to sell, and an agent who is employed to make a purchase for his principal will not be permitted either to purchase for himself, or to make a feigned purchase for his principal from himself without the consent of his employer. As we have said, the existence of a fiduciary relation-

ship between principal and agent (as in the cases of client and solicitor, ward and guardian, cestui que trust and trustee) is held to prevent the agent, in common phrase, "making a profit out of" his principal, the result being that an agent who acts adversely to the interests of his principal and deprives the latter of the benefit for which he had contracted will forfeit his right to commission.

An illustration of this is afforded by the Irish case of "Palmer *v.* Goodwin" (13 Ir. Ch. Rep., 171), which was decided in 1862, and in which an application was made by the plaintiff against his land agent and receiver for an account. The Master to whom the case had been referred found that the agent had collected and accounted for £720 rents received. But he disallowed the agent's claim to commission on that sum, on the ground of violations of his duty with respect to the management of the property, though the breaches were not connected with the collection of the rents nor the accounting for them. It was contended at the hearing that, inasmuch as the plaintiff had benefited by the defendant's services to the amount of £720, the former should pay the agreed commission. His lordship, however, disallowed the whole claim. "I cannot give my assent," he remarked, "to the idea that

the collection of rents is the whole duty of a land agent. He may very steadily and very faithfully collect and account for the rents, and yet may very steadily and very completely destroy the estate. In my mind the percentage is not given for the mere collection of rents, but is merely the mode of estimating the salary for the general management. A fixed salary is often paid in large estates, and in my opinion it is quite immaterial which mode of payment is adopted. For many purposes the Court treats an agent as a kind of trustee, and exercises a peculiar jurisdiction over him, and will, if it find him guilty of misconduct, disallow all remuneration, which is to be paid by a fixed salary or by a commission. . . . . In this Court, at least, I must consider agency as a trust which casts on the agent the general management of the property, and if the agent fails in any branch of his duty, he fails in all."

An agent, of course, cannot recover commission in respect of services rendered in an illegal transaction, but this branch of the subject, together with the much vexed questions of secret commissions and commissions connected with Stock Exchange and racecourse gambling, are outside our scope, and require no more than an allusion in a manual which may be

brought to a conclusion by a reference to one or two principles and points of interest not hitherto mentioned.

A well-known rule exists that in the absence of express authority in the instrument creating the trust a trustee or executor who happens to be a factor, agent, or auctioneer, can make no profit in the way of his business from the estate committed to his charge. This flows from the equitable doctrine of which we have spoken. But *Expressum facit cessare tacitum.* Where an instrument expressly states that an auctioneer may charge for his services the implied rule has no effect. Thus in "Douglas *v.* Archbutt" (27 L.J.Ch., 271) property was assigned to the plaintiff, who was known by the assignor to be an auctioneer, though not described in the deed as such, upon trust to sell by public auction or private contract, and out of the sale moneys to pay the costs, charges and expenses of preparing for, making and completing such sales, "including the usual auctioneer's commission." The plaintiff sold the property by auction, and the question now raised was whether he was entitled to charge his commission on the sale. The deed clearly contemplated a sale by auction, and the Court held that the words above mentioned authorised the plaintiff to charge commission.

To the same effect and based on the same ground is the rule uniformly acted on that a solicitor who is a trustee is not entitled to charge for professional services which are assumed to have been rendered in his character of trustee, unless there is some special contract authorising him to make the charge.

Again, where a person carries on the business of various agents, e.g., of auctioneer and surveyor, there is no rule preventing him claiming commission for services rendered in both capacities, provided such services are not rendered as trustee with no express liberty to make such charges. In "Williamson *v.* Barbour" (37 L.T.Rep., N.S. 698), an agency dispute in which an immense amount of money was involved, the late Sir George Jessel remarked, "A man is not the less an agent because as regards some part of his work he is employed to do it on the terms of his having a fair profit. Take an instance with which I am very familiar by reason of the number of judicial sales which take place in this (the Chancery) Division. You employ an auctioneer to sell a freehold estate, who happens to be, as some auctioneers are, an auctioneer and surveyor. Very many are not, but if he is an auctioneer and surveyor, and it is necessary to have the estate surveyed, and a plan of it made

for the particulars of sale, he says, 'I am a surveyor: I will do the surveying work myself.' He does the surveying work and sends in his bill as auctioneer and charges his usual commission on the proceeds of the sale. He charges what he has paid out of pocket for advertising and so on, and then he charges for surveying as a surveyor; that is to say, he charges surveyor's prices. He does not charge the mere sums he pays to his assistant for wages or otherwise; but he charges the fair price of a surveyor. If he is not a surveyor, he employs some other surveyor, and puts the same price in the account as that man charges him, but nothing in addition. He is the agent to sell the estate: but the employer, knowing he is a surveyor, and being willing that he should act in that capacity, is also willing to pay him the fair price which a surveyor ought to charge."

### REVOCATION OF AGENT'S AUTHORITY.

As a rule, an agent will not be entitled to any commission if his authority to act has been revoked before anything has been done under it. But there may be an express agreement or a custom which will abrogate this rule, and the revocation must not be the merely wrongful or capricious act of the principal whereby he desires

for his own ends to prevent the agent carrying out the work on which he was employed. In "Wilkinson *v.* Alston" (48 L.J., Q.B., 733) Lord Justice Bramwell observed, "Then it is said that at the time this introduction was effected the plaintiff's authority . . . . had ceased, having been revoked by the letter written by the defendant," but "even had this letter been, as contended, a revocation of the authority, it would have been too late, for the authority had been acted upon, and the introduction had already taken place before the date of that letter."

In the text books on agency and commission law will be found a string of cases upholding Lord Justice Bramwell's exposition of the law, and of these we may quote "Noah *v.* Owen" (2 T.L.R., 364), a case in which the notorious "promoter" Baron Grant was concerned. The defendant was the owner of certain properties in the Transvaal, among others the Lisbon and Berlyn farms, and was anxious to form a company to work the gold mines thereon. He agreed to pay a commission of £3,000 to the plaintiff if he introduced him to a Mr. Brandon, and Brandon succeeded in inducing Baron Grant to consider the question of forming a company to purchase the property and work the mines. But Brandon was unable to bring the matter to

a satisfactory termination, and Owen withdrew it from his hands and placed it in those of a Mr. Cardew, who shortly afterwards succeeded in getting Baron Grant to float the Lisbon-Berlyn Gold Mining Company. The plaintiff thereupon claimed his commission, or damages in lieu thereof, alleging that the defendant had taken the matter out of Brandon's hands and so prevented the commission being earned. The jury found that there had been a contract between the plaintiff and the defendant: that that contract had been broken; and that the plaintiff had performed his part of it. They assessed the damages at £600, and the Divisional Court ordered judgment to be entered for that amount. The Court of Appeal, however, reversed this decision and held that the defendant was entitled to judgment notwithstanding the findings of the jury. "The person employing the agent," said the Master of the Rolls, "was not compelled to allow the agent to go on with the work provided the employer had derived no advantage from the services rendered. If the employer had derived such advantage and took the case out of the agent's hands, and thus prevented him earning his commission, the authorities showed that the agent could sue for damages, though not for commission. . . . Brandon could

not get Baron Grant to take the matter up, and the defendant, finding the matter dragged, withdrew it from Brandon. If it could have been shown that this was a trick to deprive Brandon and the plaintiff of their commission and to take advantage of their services, an action would have lain. But there was no evidence of this and no such case was left to the jury."

It is important to note the distinction between a revocation of the agent's authority by the act of the principal and a revocation by the death of the principal. In the former case if the revocation is unlawful the agent will be entitled at least to recover the expenses to which he has been put in acting upon the authority before it was revoked (unless his agreement was of the qualified nature that he was to get nothing if the authority was countermanded before execution): in the latter case he has no such right. Thus in the "classic" case of "Campanari *v.* Woodburn" (15 C.B., 400), where an intestate had authorised the plaintiff to sell a picture of the intestate, and promised him £100 for his trouble in case he succeeded in selling it, but before any sale had been effected the intestate died, and after his death the plaintiff sold the picture and claimed the £100, it was held that the authority to sell was revoked by the death

of the intestate, and that his administrator was not bound to pay the £100. "It is plain," said Chief Justice Jervis, "that the intestate might in his lifetime have revoked the authority without rendering himself liable to be called upon to pay the £100, though possibly the plaintiff might have had a remedy for a breach of the contract if the intestate had wrongfully revoked his authority after he had been put to expense in endeavouring to dispose of the picture. In that way, perhaps, the plaintiff might have recovered damages by reason of a revocation. His death, however, was a revocation by the act of God, and the administrator is not, in my judgment, responsible for anything."

# APPENDIX.

# A LIST OF CLAIMS

FOR

## Auctioneers' and Estate Agents' Commission,

REPORTED IN THE "ESTATES GAZETTE."

| | Vol. of *Estates Gazette.* | Year. | Page. |
|---|---|---|---|
| *Adam Brothers* v. *British Linen Co. Bank and Kingsmill.*—Purchase of Southsea House, City, no employment to negotiate | LVI. | 1900 | 29 |
| *Adams and Parker* v. *Rouse*—Rival house agents | XLVII. | 1896 | 662 |
| *Addison* v. *Miles*—Sale of a house | XXXVII. | 1891 | 496 |
| *Ainsworth* v. *Watson and Woodhead (Ltd.)*—Disputed liability | LI. | 1898 | 759 |
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Times, Nov. 1st 1906

(*Before* MR. JUSTICE A. T. LAWRENCE *and a Common Jury.*)

GREENWOOD AND ANOTHER V. TURNER.

This was an action by a firm of auctioneers and estate agents to recover a sum of £66 5s. as commission on the sale of a block of five houses at Chiswick.

Mr. Ernest Todd appeared for the plaintiffs; and Mr. Woodfin for the defendant.

It appeared that in April, 1905, the defendant, Mrs. Turner, being anxious to dispose of the property in question, consulted a Mr. Powell, who was an estate agent, but not an auctioneer, and was referred by him to the plaintiffs. Negotiations between Mrs. Turner and the plaintiffs followed, and resulted in the plaintiffs' being instructed to offer the property by auction upon the terms that if no sale were effected the plaintiffs should have two guineas per house for expenses, and in the event of a sale they should be entitled to the actual out-of-pocket expenses and 2½ per cent. on the amount the property realized. The plaintiffs offered the property by auction on May 22, 1905, but the reserve price fixed by Mrs. Turner, £2,750, was not reached, and a sale was not effected. The defendant did not then in terms withdraw her authority from the plaintiffs. By her son she sent

directing all the powers of a clear narrow mind and dogged will to the realization of a single aim, he gained great influence, some shreds of which still remain. Many, for their conscience' sake, have been persecuted by him; and he, for his conscience' sake, persecuted them. Being what he is, it is inevitable that he should do as he does. Such a personality is unable to appreciate or even understand a personality of any other type than

THE TIMES, THURSDAY

The *Matin* adds that this outburst, made at the opening of the congress on Friday last, was received with warm approval, although it excited surprise among some old jurists, who, however, did not venture to protest. At this meeting Dom Besse, a Benedictine monk, partly attributed the tendency towards schism, which was becoming manifest among the French clergy, to the presence in Paris of "an American Bishop, Catholic but dissident, who has succeeded in securing in the State of New York 50,000 adherents—that is to say, in making 50,000